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ALEXANDER L. STEVAS,

No. 82-282

In the Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS C. MCCAIN, ET AL., APPELLANTS

v.

CHARLES E. LYBRAND, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Appellants, black voters of Edgefield County, South Carolina, initiated this suit in 1974 against the five members of the Edgefield County Council, the three members of the Edgefield County Board of Election Commissioners and the president of the Executive Committee of the Edgefield County Democratic Party. Appellants alleged that the County's use of an at-large system for electing members of the county council violated the United States Constitution and federal civil rights statutes[1] because it diluted black

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[1]Specifically, appellants alleged violations of the First, Thirteenth, Fourteenth and Fifteenth Amendments and of 42 U.S.C. 1971, 1972 and 1973. J.S. App. 2a.

voting strength and because the residency districts from which council members ran were malapportioned. J.S. App. 2a-3a. The district court granted appellants' motion for summary judgment on the malapportionment claim, *Lytle* v. *Commissioners of Election*, 376 F. Supp. 304 (D.S.C.), but that ruling was reversed on appeal, 509 F.2d 1049, 1054 (4th Cir.), and this Court denied a petition for a writ of certiorari, 419 U.S. 1032 (1974).

Appellants' dilution claim was tried in 1975 and, after unsuccessful attempts to achieve a settlement, the district court granted judgment for appellants in April 1980. Shortly thereafter, this Court rendered its decision in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), and the district court granted appellees' motion to vacate its decision and reopened the case to permit the parties to submit additional evidence concerning whether the at-large scheme was adopted or maintained with discriminatory intent. The district court has not yet ruled on appellants' dilution claim. J.S. App. 4a-5a.[2]

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[2]Appellants have moved to reinstate the April 1980 judgment in their favor on the basis of this Court's recent decision in *Rogers* v. *Lodge*, No. 80-2100 (July 1, 1982), and Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, as amended by Section 3 of the Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 134. If appellants succeed in having the prior judgment reinstated, the questions raised by this appeal would be mooted. Nevertheless, we submit that it would be inappropriate for the Court to defer consideration of this appeal pending disposition below of the constitutional and Section 2 issues. This Court's decisions establish that courts should not pass on the constitutionality of legislation that is subject to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, but has not received preclearance thereunder because such legislation is not yet legally effective. See *United States* v. *Board of Supervisors*, 429 U.S. 642, 646-647 (1977); *Connor* v. *Waller*, 421 U.S. 656 (1975). Similar reasoning would apply to statutory challenges to unprecleared legislation.

Section 5 was designed as an alternative to "case-by-case litigation [, which] had proved ineffective in large part because voting suits had

2. The district court also permitted appellants to supplement their complaint to allege that the county's use of the at-large voting scheme violated Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, because it was a voting change implemented without the preclearance required by that statute.[3] A three-judge district court was convened to hear appellants' Section 5 claims. J.S. App. 2a, 5a. This appeal is from the three-judge court's order (J.S. App. 2a-22a) denying appellants' request for injunctive relief.

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been 'unusually onerous to prepare' and 'exceedingly slow' to produce results." *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 118 (1978). The purpose of Section 5 thus was to "shift[] the advantages of time and inertia from the perpetrators of the evil to its victims." 435 U.S. at 121. To abstain from deciding the Section 5 issues raised by this appeal pending disposition of the constitutional and Section 2 issues, however, would "place the advantages of time and inertia back on the perpetrators of the discrimination • • •." 435 U.S. at 125. In practical terms, we note that the next Edgefield County election is scheduled for the fall of 1984, to be preceded by the qualifying of candidates in March 1984 and primaries in June 1984. Accordingly, and in view of the fact that it is unlikely that the constitutional and statutory claims currently pending below will be finally decided substantially in advance of those dates, we suggest that the Court decide the preclearance issue promptly in order to avoid the possibility of an election's being conducted pursuant to procedures that have not been precleared and to afford appellees the opportunity to seek preclearance in advance of the next scheduled election, if necessary.

[3]Section 5 of the Voting Rights Act bars certain covered jurisdictions (including Edgefield County) from implementing any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" without obtaining preclearance from the Attorney General of the United States or the United States District Court for the District of Columbia. A jurisdiction requesting preclearance under Section 5 has the burden of demonstrating that the change in voting practice does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or language minority status. *Georgia* v. *United States*, 411 U.S. 526, 538 (1973); see also *City of Richmond* v. *United States*, 422 U.S. 358, 380-381 (1975) (Brennan, J., dissenting).

a. As of November 1, 1964, Edgefield County was governed by a three-member Board of Commissioners consisting of an elected supervisor of roads and two board members appointed by the Governor upon the recommendation of the county's state legislative delegation. In June of 1966, the state legislature enacted Act 1104, which created a three-member county council for Edgefield County with all three council members elected at-large from residency districts. It is undisputed that this Act was subject to the preclearance requirements of Section 5 but was never submitted for Section 5 review. J.S. App. 5a-6a.

In 1971, Act 1104 was amended by Act 521, "An Act To Amend Act 1104 Of 1966 * * * So As To Increase The Number Of Districts And The Number Of County Council Seats." As its title indicates, the Act increased both the number of residency districts in Edgefield County and the number of council members from three to five. J.S. App. 6a-7a, 10a. The Act was submitted to the Attorney General pursuant to Section 5 and, after requesting and receiving additional information, on November 24, 1971, the Assistant Attorney General for the Civil Rights Division advised that "[t]he Attorney General does not interpose any objections to the change in question." J.S. App. 43a.

b. In 1975, South Carolina enacted the Home Rule Act, S.C. Code Ann. § 4-9-10 *et seq.* (Law. Co-op. 1977). This Act transferred some powers from the state legislature to county officials and afforded each county the opportunity to hold a referendum by July 1, 1976, to determine whether to change its form of government to one of five alternative forms designated by the Act. The legislation further provided that if no referendum were held by July 1, 1976, the county would "have the form of government including the method of election, number, composition and terms of the governing body most nearly corresponding to the form in effect in the county immediately prior to that date." By

letter of August 28, 1975, the Attorney General interposed no objection to the Home Rule Act as such, "but he indicated that the outcomes of Home Rule Act referenda or assignments of forms of government under the Act would be subject to preclearance." *Blanding* v. *Dubose*, 454 U.S. 393, 396 (1982).

Edgefield County did not hold the referendum provided for by the Home Rule Act, but instead passed a resolution and ordinance on June 21, 1976, adopting the council-administrator form of government, the form that the legislature previously had determined was most like that already in effect in the county. The resolution and ordinance were submitted to the Department of Justice for Section 5 preclearance. J.S. App. 8a. By letter dated February 8, 1979, the Attorney General interposed an objection to the resolution and ordinance, noting (*id.* at 30a) that while the council-administrator form of government provided for "ostensibly, the same system of election used by the county in electing its present council, we note differences in that body as presently constituted and as it would exist under the Home Rule Act." After describing these differences and other considerations that influenced his decision, the Assistant Attorney General concluded (*id.* at 37a) that "on behalf of the Attorney General, I must interpose an objection to the implementation of the requirements of the South Carolina Home Rule Act in the context of the at-large election system existing in Edgefield County."

3. Appellants argued below that the county's use of the at-large electoral scheme should be enjoined because the 1966 Act, which initiated the scheme, had never been precleared under Section 5 and, alternatively, because the Attorney General had interposed a valid objection to the implementation of the requirements of the South Carolina Home Rule Act in the context of the at-large election system in Edgefield County.

The district court rejected both arguments. It first held (J.S. App. 10a-13a) that although the 1966 Act itself had not been submitted for preclearance, the change to at-large elections embodied therein had received preclearance when the Attorney General subsequently failed to interpose an objection to the 1971 Act increasing the number of residency districts and council seats. The court found that because the Attorney General, in reviewing the 1971 Act, had requested additional information, including "*a copy of the election statute now in force*" (*id.* at 11a; emphasis by the court), his review had encompassed "all aspects of the Act, including the effect of the at-large with residency requirement voting that had been implemented in 1966" (*id.* at 12a). The court further reasoned (*id.* at 13a) that the language of the 1971 Act — " 'striking out' " all the provisions of the 1966 Act relating to the form and method of election and replacing them with "completely new provisions" — provided an additional basis for inferring preclearance of the at-large features of the earlier Act.

The district court rejected appellants' alternative argument on the ground that the 1976 resolution and ordinance adopting the council-administrator form of government did not create a "change" subject to Section 5 preclearance. J.S. App. 14a-18a.[4] The court relied on *Woods* v. *Hamilton*, 473 F. Supp. 641 (D. S.C. 1979), to hold (J.S. App. 17a) that the Attorney General's [August 28, 1975] letter[5] "precleared

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[4]The court held (J.S. App. 14a-16a) that appellees had standing to raise the question whether the resolution and ordinance produced a change notwithstanding the Attorney General's prior determination that they did.

[5]The district court erreously referred (J.S. App. 17a) to June 27, 1975, as the date of the Attorney General's letter preclearing some aspects of the Home Rule Act. South Carolina submitted the Home Rule Act for preclearance by letter dated June 27, 1975; the Attorney General's response was dated August 28, 1975. See *Woods* v. *Hamilton*, 473 F. Supp. 641, 645 (D.S.C. 1979).

both the holding of referenda and the transfer of powers under the Home Rule Act" and that "the June 21, 1976 resolution and ordinance resulted in no change in the form or method of electing [the] Edgefield County Council, and * * * are not a change subject to § 5 preclearance."

DISCUSSION

1. The decision of the three-judge court that the Attorney General precleared the 1966 change to at-large elections when he reviewed the 1971 Act increasing the number of residency districts and council members is error under this Court's consistent interpretation of Section 5. As the Court held in *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 136 (1978), "the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." Contrary to the district court's conclusion, the 1966 change to at-large elections was never properly submitted or precleared by the Attorney General.

a. It is undisputed that the 1966 statute — Act 1104 —which provided for at-large elections, was never submitted to the Attorney General pursuant to Section 5. Rather, in 1971 Edgefield County submitted for Section 5 review Act 521, "An Act To Amend Act 1104 Of 1966 * * * So As To Increase The Number Of Districts And The Number Of County Council Members." As its title suggests, the sole purpose of the 1971 statute was to increase the number of residency districts and, accordingly, the size of the county council. The statute accomplished that end by adding new provisions of law and by striking out and re-enacting existing provisions of law, including the provision for at-large elections.

Neither the district court nor appellees suggest that the provision for at-large elections was specifically brought to

the Attorney General's attention in the context of the county's 1971 submission.[6] Nevertheless, the district court ruled that the technical re-enactment in the 1971 Act of the provision for at-large elections constituted a proper submission of that provision. That conclusion, however, cannot be squared with this Court's admonition in *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), that a submission must request the Attorney General's consideration in "some unambiguous and recordable manner" (*id.* at 571):

> [W]e do not think the Act contemplates that a "submission" occurs when the Attorney General merely becomes aware of the legislation, no matter in what manner. * * * A fair interpretation of the Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act.

See also *City of Rome* v. *United States*, 446 U.S. 156, 169-170 n.6 (1980). When a jurisdiction adopts legislation that makes a clearly defined change in its form of government and that also reenacts pre-existing provisions of law, the mere submission of a copy of that legislation cannot constitute an "unambiguous" request for Section 5 review of those provisions that do not purport to change the law, since they presumably are not subject to Section 5 review.

This conclusion is fully supported by guidelines that the Attorney General has adopted specifying submission procedures, which this Court has held are entitled to deference. See *Blanding* v. *Dubose*, 454 U.S. 393, 401 (1982); *United*

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[6] Neither side to these proceedings was able to locate the actual letter submitting the 1971 statute for preclearance and, hence, it is not a part of the record of this case. We have found a copy of the letter in our files and are attaching it as an appendix hereto (H2206 was the South Carolina House bill number of Act 521 of 1971).

States v. *Sheffield Board of Commissioners, supra,* 435 U.S. at 138. The version of the guidelines that was in effect prior to the completion of the county's 1971 submission required that a submission "clearly set forth" the voting change in a manner "adequate to disclose to the Attorney General the difference between the existing and proposed situation with respect to voting." 28 C.F.R. 51.5, 51.10(a)(4) (1980).[7] Since the only differences specifically called to the attention of the Attorney General were the changes in the number of residency districts and the size of the council, he was entitled to conclude that the submission was limited to the changes in law reflected in the Act's stated purpose. See *United States* v. *Sheffield Board of Commissioners, supra,* 435 U.S. at 137-138.

The district court's reliance (J.S. App. 10a-12a) on the Attorney General's routine request (see 28 C.F.R. 51.18 (1980)) for more information following his receipt of the

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[7]The guidelines (28 C.F.R. 51.10(b) (1980)) also

> strongly urge[d] the submitting authority to include the following information insofar as it is available and relevant to the specific change submitted for consideration:
>
> • • • • •
>
> (4) A copy of any other changes in law or administration relating to the subject matter of the submitted change affecting voting which have been put into effect since the time when coverage under section 4 of the Voting Rights Act began and the reasons for such prior changes. • • •

Proposed guidelines were published for comment before Edgefield County made its initial submission of the 1971 Act (36 Fed. Reg. 9781 *et seq.* (May 28, 1971)) and were published in final form (36 Fed. Reg. 18186 *et seq.* (Sept. 10, 1971)) several days before the submission was complete. Even though the final version of the guidelines were not in effect when the 1971 Act was initially submitted, Edgefield County thus was on notice of the kind of information and explanation the Attorney General deemed necessary to identify changes that were not readily apparent from the face of the legislation and that the duty to provide this information rested with the covered jurisdiction.

county's 1971 submission also is misplaced. As the court below noted (J.S. App. 11a), the Attorney General specifically requested "a copy of the election statute now in force," and received a copy of the 1966 Act, which provided for the at-large election of county council members. He thus "had the 1966 Act before him and was aware that the form and method of election of the Edgefield County Council then in effect had been adopted in 1966" (*id.* at 12a). But, if anything, this information confirmed what was apparent on the face of the 1971 statute — that the voting change then being submitted was a change only in the *number* of residency districts and, hence, only in the *size* of the county council. As noted above (pages 8-9, *supra*), however, merely making the Attorney General aware of legislation enacted after the effective date of Section 5 coverage does not constitute an adequate submission. This is especially true where, as here, the jurisdiction does not even inform the Attorney General that the earlier statute was subject to Section 5 and had never received preclearance. As the Court noted in *United States* v. *Sheffield Board of Commissioners, supra,* 435 U.S. at 138 n.28, the burden of submission rests with the jurisdiction, and the "Attorney General should [not] be charged with notice of all provisions of local law." The Attorney General thus was entitled to presume that the at-large method of election was validly in force and therefore was not subject to review at the time the 1971 Act was submitted.

b. The district court also erred in concluding that the Attorney General in fact evaluated and therefore precleared the change to at-large voting when he reviewed the 1971 Act. The court inferred (J.S. App. 12a) that the Attorney General's review of the 1971 Act "encompassed all aspects of the Act, including the effect of the at-large with residency requirement voting that had been implemented in 1966" because he was provided with a copy of the existing election

law as well as information concerning previous candidates, election results, and residency district boundaries. In the absence of clear evidence, however, it cannot properly be concluded that the Attorney General considered and precleared anything other than the particular change that was submitted to him for review, that is, the 1971 changes in the number of residency districts and size of the county council. See *United States* v. *Sheffield Board of Commissioners, supra,* 435 U.S. at 137-138.

The November 24, 1971 letter of preclearance refers only to the 1971 Act (J.S. App. 43a-44a). Moreover, while the information the Attorney General requested and received concerning the 1966 Act and its application was sufficient to enable him to make the determination whether the new residency district lines were drawn in a non-discriminatory manner, if he had intended to review the at-large aspect of the voting scheme he would have needed, in addition, information concerning the *pre*-1966 method of election, in order to determine whether the change from the appointive system that was in effect on November 1, 1964, to the at-large electoral system that was inaugurated in 1966 had a discriminatory purpose or effect. The Attorney General neither requested nor received any such information, and he therefore was in no position to evaluate or preclear the at-large feature encompassed in the 1971 Act.

Furthermore, the Attorney General himself did not consider the at-large feature of the 1966 Act to have been precleared. In a December 12, 1980 letter he advised state officials that the 1966 Act had never been submitted or precleared (J.S. App. 40a-42a). In these circumstances, the district court erred in concluding that the Attorney General

in fact had evaluated and precleared the change to at-large elections.[8]

2. Appellants also contend (J.S. 20) that the district court "held that the reallocation or transfer of powers from state elected officials to the Edgefield County Council under statewide home rule in 1976 was not a voting change subject to pre-clearance" and that that decision conflicts with *Horry County* v. *United States*, 449 F. Supp. 990 (D.D.C. 1978). Contrary to appellants' assertion (J.S. 20), however, neither the court below nor any other court of which we are aware has held that such a transfer of powers is

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[8]This case is distinguishable from *United States* v. *Georgia*, Civil Action No. C76-1531A (N.D. Ga. Sept. 30, 1977), summarily aff'd, 436 U.S. 941 (1978). There, the district court dismissed a suit brought by the United States to compel Georgia to submit for preclearance two provisions of its 1964 Election Code on the ground that, "[i]n the absence of any requirement that a specific submission procedure be followed," Georgia had complied with the submission requirements of *Allen* v. *State Board of Elections*, *supra*, when, in 1970, it requested the Attorney General to review the entire state election code, which included the two 1964 voting changes. *United States* v. *Georgia*, No. 77-1376 (1977 Term) J.S. App. 11a. In so holding, the court relied heavily (*id.* at 11a-12a) on a March 30, 1973 letter from the Assistant Attorney General, Civil Rights Division, that stated that one of the two changes had been precleared in 1970 and on a decision of the Fifth Circuit, *Pitts* v. *Cates*, 536 F.2d 56 (1976), that indicated that the other change also had been precleared (536 F.2d at 57).

Here, by contrast, there is no finding that appellees, by their 1971 submission, sought review of *all* of the provisions of Act 521. Nor is there any direct evidence, like the letter in *United States* v. *Georgia*, indicating that the Attorney General in fact precleared the 1966 change to at-large elections. To the contrary, the Attorney General's letter of December 12, 1980, correctly advised South Carolina officials that the 1966 Act had never been submitted to the Attorney General or the District Court for the District of Columbia for preclearance (J.S. App. 40a-42a). Moreover, the appellees in this case had the benefit of regulations promulgated by the Attorney General to aid them in formulating an unambiguous request for preclearance of the change to an at-large electoral scheme.

not a change in voting procedures within the meaning of Section 5. Rather, the district court, following the decision in *Woods* v. *Hamilton*, 473 F. Supp. 641, 644-647 (D.S.C. 1979), simply concluded (J.S. App. 17a) that the Attorney General had precleared the transfer of powers provided for by the Home Rule Act when that legislation was submitted for preclearance in 1975 (see note 10, *infra*). This treatment of the transfer of powers issue is fully consistent with the conclusion of the court in *Horry County*, *supra*, 449 F. Supp. at 995, that the reallocation of local governmental power occasioned by the Home Rule Act and the county's implementing ordinance constituted a change subject to Section 5 review.[9] Appellants thus have not identified a conflict of decisions or additional issue requiring resolution by this Court.[10]

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[9]The *Horry County* court did not consider whether the Attorney General had precleared the transfer of powers feature of the Home Rule Act when that Act was submitted to him in 1975.

[10]This case raises the question, however, of whether the Attorney General in fact precleared the transfer of powers feature of the Home Rule Act when it was submitted to him in 1975 since, if he did not, Edgefield County's 1976 resolution and ordinance implementing that transfer of powers was a change in voting requiring preclearance under *Horry County* v. *United States*, *supra*.

In *Woods* v. *Hamilton*, *supra*, in which private plaintiffs and the United States sought to enjoin officials of Charleston County, South Carolina, from implementing the Home Rule Act in that county, we took the position that the Attorney General had not precleared the transfer of powers feature of the Home Rule Act that was submitted to him in 1975. We argued that the Attorney General had precleared only the holding of referenda to determine whether to change the form of local government (see page 4, *supra*), while reserving the right to review each county's subsequent implementation of all other aspects of the Home Rule Act. The court ruled against us in *Woods* v. *Hamilton*, however, holding (473 F. Supp. at 644-647) that the entire Home Rule Act had been submitted to the Attorney General for preclearance in 1975, and that when he expressly precleared some features of it and expressly reserved the right to object to others, his failure specifically to

CONCLUSION

For the foregoing reasons, we believe the judgment of the district court should be reversed and the case remanded to afford Edgefield County an opportunity to seek preclearance of the change to at-large elections. It may be, however, that plenary consideration is unnecessary. In our view, the decision regarding preclearance of the change to at-large voting is so plainly erroneous in light of this Court's decisions in *Allen* v. *State Board of Elections, supra,* and *United States* v. *Sheffield Board of Commissioners, supra,* and the Attorney General's Section 5 guidelines as to justify summary reversal.

Respectfully submitted.

REX E. LEE
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FEBRUARY 1983

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mention the transfer of powers constituted preclearance of that feature as well.

We did not appeal from the decision in *Woods* v. *Hamilton*. Accordingly, we are estopped from relitigating the question whether the Attorney General in fact precleared the transfer of powers feature of home rule in 1975. Because appellants were not parties to the proceedings in *Woods* v. *Hamilton*, they are free to present that question for review. We note, however, that the Court need not reach that issue if it agrees with appellants and us (pages 7-11, *supra*) that the Attorney General's failure to object to the 1971 Act did not constitute preclearance of the previous change to at-large elections. In that event, the basis for the district court's conclusion that the 1976 resolution and ordinance was not a change in voting — that the form and method of electing the county council mandated by it already had been precleared (see J.S. App. 17a) — would be eliminated.

APPENDIX

STATE OF SOUTH CAROLINA

OFFICE OF THE ATTORNEY GENERAL
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July 21, 1971

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CERTIFIED MAIL

Honorable David L. Norman
Acting Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D.C. 20530

Re: Submission under Section 5, Voting Rights Act

Dear Mr. Norman:

In accordance with the provisions of Section 5 of the Voting Rights Act of 1965, there are submitted herewith copies of the following listed acts, which have been passed by the General Assembly of the State of South Carolina, and approved by the Governor during the current session.

RATIFICATION NO.	ACT NO.	DATE APPROVED
R446	H1835	June 1, 1971
R464	H1396	June 2, 1971
R516	H2007	June 4, 1971
R530	H2036	June 8, 1971
R609	H1080	June 17, 1971
R611	H1910	June 17, 1971
R630	S511	June 22, 1971
R674	H1896	June 22, 1971
R682	H1768	"
R689	H2162	"
R694	S567	June 25, 1971
R705	H2229	"
R718	H2184	"
R720	H2198	"
R722	H2206	"
R730	H2110	"
R757	H2209	"
R758	H2228	"

Very truly yours,

James H. Quackenbush, Jr.
Assistant Attorney General

JHQ/mn
Enclosures